80-822

Supreme Court, U. S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

NO. _____

Jane Livingston, Administratrix of
the Estate of Haldon C. Livingston,
Deceased ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SIDNEY S. McMATH
McMATH & LEATHERMAN, P.A.
711 West Third Street
Little Rock, Arkansas 72203

Counsel for Petitioner

QUESTION TO BE PRESENTED

Does federal jurisdiction encompass an interstate body of water which has a past history of navigability, forms a continuous route for trade and travel, and may in the future become navigable in fact?

INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions to Be Presented 2

Statement of the Case 3

Reasons for granting the Writ 4

I. The Decision Below Conflicts with the Decisions of the United States Supreme Court 4

II. The Decision Below Conflicts with Other Circuit Courts of Appeal 7

III. The Decision Below is in Conflict with the Decisions of Other United States District Courts and the 8th Circuit Court of Appeals 8

Conclusion 10

Appendix 11

CITATIONS

Cases: Page

Daniel Ball, 77 U.S. (10 Wall.) 557, (1870) 5

Economy Light & Power Co. v. United States, 256 U.S. 113 (1921) 6

Free v. Sample, 324 F. Supp. 1362 (W.D. Ark. 1971) 8

George v. Beavark, Inc., 402 F. 2d 977 (8th Cir. 1968) 9

Loc-Wood Boat & Motors v. Rockwell, 245 F. 2d 306 (8th Cir. 1957) 9

Madole v. Johnson, 241 F. Supp. 379 (W.D. La. 1965) 8

The Montello, 87 U.S. (20 Wall.) 557 (1874) 5

In re River Queen, 275 F. Supp. 403 (1967) 35

Rochester Gas and Electric Corp. v. Federal Power Commission, 344 F. 2d 594 (2nd Cir. 1965) 7

United States v. Appalachian Power Co., 311 U.S. 377 (1940) 9

United States v. Holt State Bank, 270 U.S. 49 (1926) 7

United States v. Utah, 283 U.S. 64, (1931) 7

In re Wood's Petition, 145 F. Supp. 848 (W.D. Mo. 1956) 9

Miscellaneous: (Not cited but helpful)

Barnes, "Before and After *United States v. Reliable Transfer:* An Analysis of Maritime Collision Law," 1 University of Arkansas at Little Rock Law J 300 (1978)

G. Gilmore & C. Black, *The Law of Admiralty,* 2nd ed. (1976)

Guinn, "An Analysis of Navigable Waters of The United States," 18 Baylor L. Rev. 559, (1966)

McCaughan, "Federal Maritime Jurisdiction Over Inland Interstate Lakes," 26 Wash. & Lee L. Rev. 1 (1969)

Robertson, *Admiralty and Federalism,* (1970)

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

NO. _____

Jane Livingston, Administratrix of
the Estate of Haldon C. Livingston,
Deceased ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Jane Livingston, Administratrix of the Estate of Haldon C. Livingston, deceased, respectfully prays for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 13, 1980.

OPINION BELOW

Opinion of Court of Appeals not yet reported appears in the Appendix hereto. The Opinion of the United States District Court, Eastern District of Arkansas, Harrison Division, appears in the Appendix.

JURISDICTION

Suit in the United States District Court was filed under the provisions of Title 46, Section 740, United States Code, on Admiralty and Maritime Jurisdiction. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1). This petition for certiorari was filed within ninety days of the date of judgment.

QUESTION TO BE PRESENTED

Does federal jurisdiction encompass an interstate body of water which has a past history of navigability, forms a continuous route for trade and travel, and may in the future become navigable in fact?

STATEMENT OF THE CASE

Haldon Livingston drowned while fishing on the Norfork River 700 feet below the Norfork Dam. The property below the dam on both sides of the Norfork River is owned by the federal government and maintained and operated by the Corps of Engineers. The Norfork River runs generally north and south from the dam to the White River. On the west bank of the Norfork River and opposite the scene of the fatality, the Corps of Engineers maintains a campsite for citizens using the Norfork Lake area for recreational purposes. Opposite the campsite is a boat ramp maintained by the Corps of Engineers. The Norfork Dam was completed in 1945. The construction company left extending out into the river a cable which was used as an anchor for a footbridge. The length of the cable was 93 feet, and it extended from the east bank of the Norfork River at about a 45-degree angle. There was a distance of 20 feet from the bank to the cable's descent into the water. It continued underneath the water for a considerable distance before it was anchored into the river bottom. There had been a number of accidents involving this cable. The pole and cable could be seen from the bank, but in the water it was difficult to see. The existence of the cable and the accidents which had occurred were known by the supervisory rangers who worked for the Corps of Engineers. Following the death of Mr. Livingston, the cable was removed from the river by the Corps of Engineers.

The dam's generating units were on at the time of the accident. The river was approximately 200 to 300 feet wide and running at a speed of 8 to 10 miles per hour with a depth of 4 feet. The cable extended along the bed of the river, but could not be seen because the generators were on.

The Norfork River in its natural state was a stream 150 miles long running south from Howell County, Missouri, to Norfork, Arkansas, where it empties into the White River. The White River flows into the Mississippi River. A dam was constructed on the Norfork River 3.4 miles upstream from the confluence of the Norfork and White Rivers in 1941. Norfork Lake, formed by the dam, extends up from Arkansas into the state of Missouri and is recognized as a navigable body of water. The White River is recognized as a navigable stream.

Historically, the Norfork River was navigable and it was extensively used for commercial purposes. In the latter half of the eighteenth century a settlement came into existence at the junction of the Norfork and White Rivers. From this early time until 1941 when the dam was built, various cargoes were regularly carried up and down the river. The United States District Court found that based upon the history of navigability of the Norfork River it was navigable for the purposes of admiralty jurisdiction. See Appendix.

The United States Circuit Court of Appeals reversed the District Court and found that the Norfork River was not navigable for the purposes of admiralty jurisdiction because of the dam construction it was not navigable in fact. See Appendix.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT.

The test of navigability was proposed by the United States Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870). In *Daniel Ball* the libeled ship was a steam vessel which carried both passengers and merchandise intrastate between the cities of Grand Rapids and Grand Haven, Michigan. Concluding that the Grand River on which the ship operated was navigable, the court adopted the following test:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on the water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the states, *when they form in their ordinary condition* by *themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.*" At page 1001. (Emphasis supplied.)

The boundaries of this general rule were further defined in *The Montello*, 87 U.S. (20 Wall. 557) 1874. *Montello* involved the navigability of the Fox River in Wisconsin which in its natural state was obstructed by rapids and falls. It was argued that since the Fox River was non-navigable in its natural state the court was without jurisdiction. The Supreme Court disagreed noting that the river had in the seventeenth century been used by fur traders and more recently had been travelled by Durham boats, the cargoes of which had to be unloaded in the areas of the rapids and carried on land. Refusing to relinquish federal control of the river, the court stated:

"... [T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation. *If this were so the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.*

* * *

... The capability of use by the public for purposes of transportation and commerce affords a true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in which mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind can float upon the water, whether propelled by animal power, by the wind or by the agency of steam, are, or may become, the mode by which a vast commerce could be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river ... *but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce.* If this be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars." At pp. 394-395. (Emphasis supplied.)

The next major refinement of the test of navigability came with the Supreme Court's decision in *Economy Light and Power Co. v. United States*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921). There the United States sought to restrain a private power company from building a dam on the Des Plaines River, a waterway in which the government claimed was navigable. The evidence revealed that since 1835 the river had been obstructed by artificial dams which

made travel or commerce upon it impossible. Despite the fact that under present conditions the river was clearly unnavigable, the court held that its navigability in law was established.

> "Both courts found that in its natural state the river was navigable in fact, and that it was actually used for the purpose of navigation and trading in the customary way, and with the kinds of craft ordinarily used for that purpose on rivers of the United States from early fur trading (about 1675) down to the end of the first quarter of the nineteenth century . . . later changes occurred on the river due to the drainage of a swamp in the region of the portage, the clearing away of forests affecting the rainfall, and the distribution of the runoff, thus shortening the duration of the higher stages of water.
>
> . . . We concur in the opinion of the Circuit Court of Appeals *that a river having actual navigable capacity in its natural state and capable of carrying commerce among the states, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions.*" At 123 (Emphasis supplied)

In accord, see *United States v. Utah*, 283 U.S. 64, 75 L.Ed. 844, 51 S.Ct. 438 (1931) and *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926).

II. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS OF APPEAL.

In *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (1965, 2d Cir.), the Federal

Power Commission had found the Genesee River in York to be a navigable waterway. The history of the river showed that the early settlers of the area had used the channel for rafting, agricultural products, minerals and lumber to Rochester. After 1840, however, the river was abandoned in favor of the Genesee River Canal. The court found that the limited navigation which occurred on the river between 1812 and 1840 was sufficient to demonstrate legal navigability. In reaching this conclusion the court states the general rule that water is navigable, "If (1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements." At 596.

III. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THE EIGHTH CIRCUIT COURT OF APPEALS AND UNITED STATES DISTRICT COURTS.

See *Free v. Sample*, 324 F. Supp. 1362, (W.D. Ark. 1971). In *Free v. Sample* the District Court quoted an Eighth Circuit case as follows:

> "Again in *George v. Beavark, Inc.*, 402 F.2d 977 (1968) our Eighth Circuit Court of Appeals, Judge Mahaffey, Circuit Judge for the Court, stated the rule of law that 'If the river w s navigable prior to construction of the dam it continues to be considered as a navigable stream.' "

The United States District Court in *Free v. Sample* followed *Madole v. Johnson*, 241 F. Supp. 379 (W.D. La. 1965).

In *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957) the court affirmed the decision of *In Re Wood*, 145 F. Supp. 458 (W.D. Mo. 1956) where it was held that the Lake of the Ozarks, a lake created by the damming of the Osage River was a navigable body of water. This conclusion was reached in spite of the fact that the lower court specifically found, "[I]t is physically impossible for boats to operate freely up and down the Osage River." The court went on to say that impossibility of navigation " . . . does not destroy the legal concept of navigability" where the stream has been navigable in the past.

This historical analysis was again used by the Eighth Circuit Court of Appeals in *George v. Beavark*, 402 F.2d 977 (8th Cir. 1968). In *George v. Beavark*, the Eighth Circuit affirmed and in so doing reviewed the well-established rules used to define navigable waters. Relying upon the Commerce Clause cases of *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co. v. United States, supra;* and *United States v. Utah, supra*, the court summarized the primary consideration involved in determining navigability:

> "*If the river was navigable prior to the construction of the dam, it continues to be considered as a navigable stream.*" At 978.

CONCLUSION

The decision below conflicts with the rules established by the United States Supreme Court for determining navigability; with other United States Circuit Court decisions; with prior decisions of the Eighth Circuit Court of Appeals and United States District Courts. For this reason a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

SIDNEY S. McMATH
McMATH & LEATHERMAN P.A.
P. O. Box 1470
711 West Third Street
Little Rock, Arkansas 72203

Counsel for Petitioner

APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 79-1877

Jane O. Livingston, Administratrix of the Estate of Haldon C. Livingston, deceased,	*	
Appellee,	*	Appeal from the United States District Court
v.	*	for the Western District
	*	of Arkansas.
United States of America,	*	
Appellant.	*	

Submitted: May 23, 1980

Filed: August 13, 1980

Before LAY, Chief Judge; BRIGHT and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

The United States brings this appeal from a judgment of the district court, sitting in admiralty. The

district court found the United States eighty percent responsible for a boating accident that resulted in the death of Haldon Livingston, and it awarded damages of $192,800 to Livingston's estate. On appeal, the United States argues chiefly that the district court lacked admiralty jurisdiction because the accident occurred on waters that, though once used for commercial shipping, are no longer navigable in fact. We agree that admiralty jurisdiction was improperly invoked in this case and therefore reverse.

I. *Background.*

A. *The Accident.*

Haldon Livingston, appellee's decedent, drowned in the Norfork River in north central Arkansas on June 13, 1974, while fishing downstream from the Norfork hydroelectric dam. Mr. Livingston was forty-four years old. The United States, through the Army Corps of Engineers, owns the dam, the river, and both banks in the area of the accident.

The Livingstons and their friends, the Emens, had been staying at a public campsite on the banks of the Norfork for several days prior to the accident. They had rented a flat-bottomed fishing boat approximately sixteen feet long and had attached to it a small outboard motor. On the evening of the accident, Haldon Livingston, together with his twelve-year-old daughter, Margaret, and fourteen-year-old Jimmy Emens, decided to motor upstream to do some more fishing. Approximately 300 feet upstream from their campsite, opposite a boat ramp maintained by the Corps of Engineers, they passed a pole in the middle of the stream. Some thirty feet beyond this pole, Mr. Livingston shut off the motor and the boat began to float downstream.

At that time, because the dam's generators had been running, the river was about 200 feet wide and 4 feet deep, with a 4 m.p.h. current.

Before Mr. Livingston or his passengers could cast their fishing lines, the bow of their boat struck a one-inch diameter steel cable. The cable was attached to the top of a twelve-foot post on the east bank of the river and angled downstream into the river about twenty feet from the bank, where it became lodged in the riverbed. The boat slipped beneath the cable and, under the force of the current, it began to submerge. The two children were able to get around the cable as the boat went under it. Somehow, though, Mr. Livingston became wedged between the cable and the back or seat of the boat, and both he and the boat were forced down to the bottom of the river. The children managed to swim to the east bank. Attempts of bystanders to rescue Mr. Livingston were unavailing.

The post on the east bank and the cable were remnants of a temporary bridge built in the 1940's by the prime contractor building the dam. The prime contractor removed the bridge in 1945, when the dam was completed, but left the post on the east bank and the cable. Neither served any useful purpose thereafter. The pole in the middle of the river near the accident had been placed there in 1945 to hold a sign warning boaters not to go further upstream because of construction. This sign disappeared in 1947 and was never replaced. There was thus no sign warning boaters about the cable, even though (as the appellee proved) the Corps of Engineers knew of at least one prior boating mishap involving the cable. While the cable was visible, the district court found that both it and the post on the east bank could be easily overlooked.

B. *The Proceedings in the District Court.*

Mrs. Livingston, as administratrix of her husband's estate, brought two wrongful death actions against the United States. One action invoked the court's admiralty jurisdiction under 28 U.S.C. §1333 (1) (1976) and claimed liability under 46 U.S.C. §742 (1976); the other action sought relief under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346 (b) and 2671-2680 (1976). These actions were consolidated for trial.

In her FTCA action Mrs. Livingston alleged that, under applicable state law, the United States was liable as a landowner for its negligence towards her husband. [1] The district court held, however, that Mrs. Livingston had failed to prove what it determined to be the requisite degree of negligence—*viz.*, willful or malicious failure to guard or to warn against a dangerous condition. Mrs. Livingston has not appealed this holding. Thus, only the district court's judgment in the admiralty action is before us on appeal.

1.

State law provides standards for assessing federal liability under the FTCA. 28 U.S.C. §2674 (1976) provides in part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]

Mrs. Livingston's admiralty action, unlike her FTCA claim, necessarily proceeds upon the assumption that the Norfork River is navigable. [2] The district court, addressing this jurisdictional question at the outset of its analysis, determined that the Norfork must be considered currently navigable in light of its historic commercial uses. The district court proceeded to find on the merits that the failure of the United States to guard or warn against the cable, when it knew of the dangers the cable posed to those using the river, constituted a breach of its duty to use ordinary care. The court found further that Mr. Livingston's negligence was small compared to that of the United States. Accordingly, the court concluded that his estate should have damages.

C. *The Norfork River: A Historic and Geographical Sketch.*

In its natural state, the Norfork River was a small stream approximately 115 miles long, running south from Howell County, Missouri, to Norfork, Arkansas. There the

2.
28 U.S.C. §1333 (1976) provides, in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction[.]

In *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), the Supreme Court explained that federal admiralty and maritime jurisdiction extends to all public navigable lakes and rivers where commerce is carried on between different states or with a foreign nation. Hence, admiralty jurisdiction depends in the first instance upon the navigable character of the body of water in question—*i.e.*, whether it is in fact navigable in interstate or foreign water commerce. *See id.* at 457; G. Gilmore and C. Black, *The Law of Admiralty* 31-33 (2d ed. 1975).

Norfork empties into the White River, which in turn flows into the Mississippi.

Throughout the nineteenth century, settlers floated mineral products, fur pelts, and logs down the Norfork to its confluence with the White River. These products were then loaded onto barges or steamboats for transportation to the Mississippi River. After the arrival of the railroad in 1907, the settlement at the mouth of the Norfork began to thrive as logging flourished. Logging was carried on along the banks of the Norfork as far upstream as Hudson Mill, Missouri. Loggers who had gone upstream built rafts of logs twenty feet wide and up to a quarter mile long, to be floated downstream when the fall and spring rains came.

The district court found that this logging traffic was neither insignificant nor spasmodic. Between 1900 and 1930, several rafts of logs came into the settlement of Norfork every week when the river was high enough. Farmers in the area also used the Norfork commercially. In the summer months they harvested mussel shells some twenty miles upstream from Norfork and loaded them into large flat-bottomed boats. When full, these boats were floated down to Norfork, and the mussels were then shipped by railroad to a button factory in Batesville, Arkansas. Trapping upstream along the Norfork remained a lucrative business for farmers during the winter.

By 1941, however, the only traffic on the Norfork consisted of fishermen and their guides, plus an occasional raft of logs. Arrival of the automobile, improvement of local roads, extension of railroad service, and diminished demand for and supply of traditional products all conspired to decimate commercial activity on the Norfork. Indeed, the Army Corps of Engineers issued a report in 1933 declaring

the Norfork River nonnavigable. Notwithstanding this report, the district court found that there was sufficient evidence of historic commercial use of the river to consider it navigable when construction of the dam on the Norfork began in 1941.

The dam has greatly changed the character of the Norfork River. Above the dam now is Lake Norfork; below, what remains of the Norfork River runs for about three and one-half miles to the White River. The dam completely blocks travel between the river and the lake. When the dam's generators are not running, the river is very shallow, making it impossible to travel by boat without portaging in some areas. The river does rise substantially when the generators are running. Nonetheless, traffic on the river now consists almost exclusively of small skiffs used for recreational fishing.

II. *Analysis.*

In relying upon its history of commercial use to establish the present navigability of the Norfork River, the district court acted in accordance with language found in two decisions of this court suggesting that a river once navigable is always so. In *George v. Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir. 1968), we stated that "[i]f the river was navigable prior to construction of the dam, it continues to be considered as a navigable stream." [3] And in *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957), this court sustained the assertion of federal admiralty jurisdiction over a tort occurring on the Lake of the Ozarks, a lake wholly within Missouri formed by the damming of the

---

3. This statement underlies the district court's focus upon the navigability of the Norfork in 1941.

Osage River. The district court in that case had found the lake navigable because of the historic navigability of the Osage River and the continuing authority of federal agencies over vessels plying the lake. *In re Wood's Petition*, 145 F. Supp. 848, 854 (W.D. Mo. 1956).

In neither *George v. Beavark, Inc.* nor *Loc-Wood Boat & Motors*, however, was this court squarely faced with the question of whether current navigability in facts is required for admiralty jurisdiction. [4] Moreover, there are

---

4.

The sole issue on appeal, the court noted in *George v. Beavark, Inc., supra*, 402 F.2d at 978, was whether "float fishing" constituted sufficient commerce and transportation to warrant calling a stream navigable. The court determined that it did not and affirmed the district court's dismissal of the action for want of jurisdiction. Thus, the statement quoted in the text at note 3, *supra*, is dictum.

In *Loc-Wood Boat & Motors, supra*, the owners of a boat that had sunk sought exoneration from, or limitation of, their liability to the passengers. *See* 46 U.S.C. §183 (a) (1976). The district court, having determined that it had admiralty jurisdiction, made findings of "privity or knowledge" under §183 (a) that rendered the owners fully liable for the deaths and injuries suffered by the passengers. These findings were upheld on appeal. No party before the appellate court questioned the appropriateness of admiralty jurisdiction. A court may, of course, examine the jurisdictional basis of an action on its own motion. *See City of Kenosha v. Bruno*, 412 U.S. 507, 511 (1973). In *Loc-Wood*, the court said only that "[t]he lake is entirely within the state of Missouri, but is navigable water within the admiralty and maritime jurisdiction of the United States." *Loc-Wood Boat & Motors, supra*, 245 F.2d at 307 (citations omitted). The court supplied no reasons for this conclusion, and specifically said nothing about historic navigability.

George v. Beavark, Inc. and Loc-Wood Boat & Motors have been relied upon to establish admiralty jurisdiction over man-made lakes in two other district court decisions in this circuit. *Free v. Sample*, 324 F. Supp. 1362 (W.D. Ark. 1971); and *Cooper v. U.S.*, No. 77-4173-CV-C (W.D. Mo. May 6, 1980). In the latter case, Judge Hunter, while following *Loc-Wood Boat & Motors*, strongly questioned its underlying reasoning. Elsewhere the rule thought to be established by these cases has been criticized by both courts and commentators. *Marine Office of Am. v. Manion*, 241 F. Supp. 621, 622 (D. Mass. 1965); G. Gilmore and C. Black, *The Law of Admiralty* 33 n. 103 (2d ed. 1975).

indications in an earlier decision by this court that current navigability might well be required. In *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906), a case addressing the right of the public to use an old riverbed, the court stated:

> To meet the test of navigability as understood in the American law a water course should be susceptible of use or purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. * * *
>
> It does not follow that, because a stream or body of water was once navigable, it has since continued and remains so. Changes may occur * * * that work a destruction of capacity and utility as a means of transportation; and, when this result may fairly be said to be permanent, a stream or lake in such condition should cease to be classed among those waters that are charged with a public use. [*Id.* at 783-84.]

The district court determined that *Harrison v. Fite* was no longer good law on the issue of current navigability because of intervening cases such as *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940). In that case, the Supreme Court upheld the authority of Congress under the commerce clause to require federal licensing of a hydroelectric dam on a previously navigable stream. The Court indicated that a waterway capable of being made navigable in interstate commerce is a navigable water coming within the power of Congress; likewise, a waterway once determined to be navigable remains so. [5] *Id* at 407-08.

5.

The Court cited for this proposition *Economy Light Co. v. U.S.*, 256 U.S. 113 (1921), another damming case that arose under the Rivers and Harbors Act of 1899. This court relied upon both cases for the dictum in *George v. Beavark, Inc.*, *supra*, that construction of a dam does not alter a river's navigability.

Clearly, the categorical statements contained in *Harrison v. Fite* do not apply to assertions of congressional authority under the commerce clause. It does not follow, however, that they have no vitality. The Supreme Court has recently observed that precedent in this area must be evaluated carefully in light of " 'the *purpose* for which the concept of "navigability" was invoked in a particular case.' " *Kaiser Aetna v. United States*, 100 S.Ct. 383, 388 (1979) (quoting with approval from the district court opinion, 408 F. Supp. 42, 49 (emphasis in original)). The Court in that case identified four separate purposes underlying definitions of "navigability": to delimit the boundaries of the navigational servitude; to define the scope of Congress' regulatory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1899; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of "navigability."

In *Kaiser Aetna*, the Court noted specifically that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical. *See id.* at 389-90. What is required in those contexts is a functional analysis of "navigability," so that the limits of governmental authority are determined in accordance with the purposes it serves. In the case at hand, such an analysis indicates that federal admiralty jurisdiction should not be extended to Mr. Livingston's accident in the Norfork River.

Federal admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing

navigation and commercial maritime activity. Admiralty law, as a consequence, is concerned almost exclusively with the special needs of the shipping industry. *See Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 269-70 (1972); G. Gilmore and C. Black, *The Law of Admiralty* 1, 11-12 (2d ed. 1975). Extensions of admiralty jurisdiction have followed the opening of new waters to commercial shipping. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453-54 (1851). In our view, the closing of waters to commercial shipping should likewise have the effect of eliminating admiralty jurisdiction over them.[6] In other words, the concept of "navigability" in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping.

Both the Ninth Circuit and the Seventh Circuit, addressing the precise question before us, have reached the same conclusion. In *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), the court held that a dam-obstructed portion of the Missouri River no longer traversed by commercial maritime shipping was not navigable for purposes of admiralty jurisdiction, even though it would be considered navigable under the commerce clause. The court observed that, absent some present or potential commercial

---

6. This view is supported by the Supreme Court's recent statement that the exercise of admiralty tort jurisdiction requires not only the presence of navigable waters, but also a significant relationship between the asserted wrong and traditional maritime activity, such as shipping. *Executive Jet Aviation v. City of Cleveland, supra*, 409 U.S. at 261. *See Duluth Superior Excursions v. Makela*, No. 79-2034 (8th Cir. May 29, 1980); *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974) (upholding the exercise of admiralty jurisdiction over the operation of pleasure boats that present potential dangers to actual commerce). The disappearance of traditional maritime activity destroys the very possibility of such a nexus.

activity, there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a forum and applying their law to regulate conduct within their borders. *Id.* at 439. In *Chapman v. United States*, 575 F.2d 147 (7th Cir.) (*en banc*), *cert. denied*, 439 U.S. 893 (1978), the court expressly adopted the reasoning in *Adams*, holding that federal admiralty jurisdiction did not encompass a claim brought by the estate of a man who drowned in a river last used for commercial shipping in 1931.

In the case at hand, there is no dispute that commercial activity on the Norfork River ceased after construction of the hydroelectric dam in 1941-43.[7] The history of commercial traffic on the river, whatever its intrinsic interest, does not determine the scope of present-day admiralty jurisdiction. Notwithstanding any expressions to the contrary in prior decisions of this court, federal admiralty jurisdiction turns on contemporary navigability in fact. Because Mrs. Livingston failed to satisfy this test in the present case, her admiralty action should have been dismissed for want of jurisdiction. *See* Fed. R. Civ. P. 12 (h) (3).

The judgment of the district court is reversed, and the case is remanded for entry of a judgment dismissing this admiralty action for want of jurisdiction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

7.

This court has held that pleasure fishing alone is insufficient to render a stream navigable for purposes of admiralty jurisdiction. *George v. Beavark, Inc.*, *supra*, 402 F.2d at 981.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

JANE O. LIVINGSTON, Administratrix of the Estate of Haldon C. Livingston, deceased, PLAINTIFF

v. Civil No. H-75-1-C

UNITED STATES OF AMERICA DEFENDANT

JANE O. LIVINGSTON, Administratrix of the Estate of Haldon C. Livingston, deceased, PLAINTIFF

v. Civil No. H-76-19-C

UNITED STATES OF AMERICA DEFENDANT

MEMORANDUM OPINION

This is a wrongful death action brought by the Administratrix and widow of Haldon C. Livingston, on behalf of herself, her two minor children, and the estate. Case numbered H-75-1-C is an admiralty action over which this Court has jurisdiction under 28 U.S.C. §1333, provided the injury occurred upon navigable waters.

Case numbered H-76-19-C is a Federal Tort Claims action over which this Court has jurisdiction pursuant to 28 U.S.C. §§1346 (b) and 2671-2680.

The cases were consolidated and the issues of liability tried to the Honorable Terry Shell, who died before

rendering a decision. This Court provided each party with the opportunity of presenting additional evidence. Our decision is based on the transcript of the proceedings before Judge Shell and the additional testimony proffered on April 10, 1979.

Mr. Haldon Livingston drowned while fishing on the Norfork River on June 13, 1974. Mr. Livingston was forty-four years old, and a resident of Tulsa, Oklahoma, at the time of his death.

Mr. Livingston had made fishing trips to Baxter County, Arkansas, for five or more consecutive years. Although he may have made several trips each year to fish in the Norfork or White River, once each year he would bring his wife and children with him for a two-week vacation. The Livingstons' friends from Memphis, the Emens, would meet them each year at the campsite south of the Norfork dam.

The Norfork River in its natural state was a small stream approximately 115 miles long, running south from Howell County, Missouri, to Norfork, Arkansas, where it emptied into the White River. The White River flows into the Mississippi. (3½ miles)

In 1941, the United States began construction of a dam on the Norfork River. The construction of the dam was completed in 1943, but the hydroelectric generators were not completed until 1945. It was located approximately 3.4 miles upstream from the confluence of the Norfork and White Rivers. The dam created Lake Norfork, which was legislatively declared to be navigable. The dam contains two hydroelectric generators, maintained by the Corps of Engineers. Each day when the demand for electricity is

great, gates on the dam are opened and the river below the dam rises dramatically because of the discharge from the generators.

The United States maintains Lake Norfork, a fish hatchery, and several campsites in the area. The Livingstons and Emens usually stayed at the campsite on the west bank of the Norfork, approximately 2,000 feet downstream from the dam.

The Livingstons had met the Emens at the campsite on June 8, 1975. Mr. and Mrs. Livingston and their two children, Margaret and Leslie, and Dr. and Mrs. Emens and their son, Jimmy, rented a flat-bottomed fishing boat approximately 16 feet long from Lee Roundy. Each morning they would get the boat from Mr. Roundy's dock, which was approximately one-quarter mile downstream from their campsite. The Livingstons and Emens had a small motor which they attached to the boat. They would keep the boat all day, but return it to Mr. Roundy's dock each evening.

After several of the party would make an early morning fishing expedition, they would return to the campsite and leave the boat at the ramp maintained by the Corps of Engineers, which is approximately 300 feet upstream from their campsite. On June 13, Mr. Livingston, Mrs. Livingston and Jimmy Emens went fishing downstream from the campsite and into the White River. They returned. Mr. Livingston and someone went out again and returned after 3:30 p.m. Around 4:30 or 5:30 p.m., Mrs. Livingston and Mrs. Emens left the campsite to drive to the grocery store.

Mr. Livingston and Dr. Emens drank a beer. After 5:00 p.m., Mr. Livingston, his daughter Margaret, and

Jimmy Emens decided to fish some more. They got in the boat and motored upstream. Opposite the boat ramp maintained by the Corps of Engineers approximately 300 feet upstream from their campsite, they passed a pole in the middle of the stream. They did not go but approximately 30 feet past the pole, when they turned off the motor and began to float downstream on the east half of the river.

Before they could cast into the water, their boat struck a cable one inch (1") in diameter. The cable was attached to a pole on the east bank of the river. The cable was not perpendicular to the stream, but angled downstream as it entered the water. It entered the water approximately 20 feet from the east bank.

The bow of the Livingstons' boat struck the cable. Jimmy Emens and Margaret Livingston were able to get around the cable as the boat went under it. Due to the angle the cable entered the water, and the angle the cable bore to the flow of the river, the cable caused the boat to begin to submerge. As the boat went under the cable, Mr. Livingston became wedged between the cable and the back or seat of the boat. He and the boat were forced down to the bottom of the river. The children managed to swim to the east bank.

At the time of the accident, both generators on the dam were operating. The river current was approximately four miles an hour. The river was approximately 200 feet wide at the place of the accident.

Mr. Lee Roundy heard the children and saw flotation pillows passing by in the river. He got in a boat and went upstream to the scene. He saw Mr. Livingston trapped at the bottom of the river. Mr. Livingston was wearing an

unfastened vest-type life preserver. When Mr. Roundy tried to release Mr. Livingston, the life preserver slipped off. When Mr. Roundy was unable to free Mr. Livingston, he sent word to the dam to reduce the flow of water. At 6:19 or 6:20 p.m., the generators were stopped. When the river current was reduced, Mr. Roundy and others aiding in the rescue were able to free him. An ambulance crew was present when Mr. Livingston was brought from the river, however, they were unable to revive him and he was pronounced dead upon arrival at the hospital.

There was no charge for using the river or camping at the recreational area.

There was no sign warning boaters of the cable. The post in the middle of the river was visible from the shore. The post on the east bank to which the cable was attached was visible, but could be easily overlooked due to the forest growth. The cable could be discerned from the west bank, but was also easily overlooked. Approximately 200 or 300 feet upstream from the place of the accident was a sign which warned boaters not to go further upstream due to the rapid current. The Livingstons did not go as far upstream as this sign.

The post in the middle of the river where the accident occurred had been placed there around 1945 to hold a sign warning boaters not to go further upstream due to construction. The sign disappeared in approximately 1947 and was never replaced by the Corps.

The post on the east bank and the cable were remnants of a bridge built in the early 1940's by the prime contractor building the dam so that materials could be transported for the construction of the dam. When the dam

was completed in 1945, the prime contractor removed the bridge, but the post on the east bank and the cable attached to it had been left. Since 1945, the cable and the pole on the east bank had served no purpose.

The cable was not attached to the post in the middle of the river. Following Mr. Livingston's death, the cable was removed. The cable was lodged under rocks in the middle of the river bed, downstream from the center post.

In Case numbered H-76-19-C, Mrs. Livingston, as Administratrix of the estate, seeks recovery from the United States under the Federal Tort Claims Act. In this case she does not contend that the river was navigable; she contends that under the laws of Arkansas or Oklahoma, the United States is liable for its negligence as any other owner or possessor of land.

28 U.S.C. §2674 provides, in part, as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, ...

If the tort in question occurred in Arkansas on a non-navigable stream, we must apply Arkansas law to determine whether the United States is liable for Mr. Livingston's death.

Ark. Stat. Ann. §§50-1103 and 1104 provide as follows:

> 50-1103. Owner without duty to keep premises safe or warn of dangerous condition—exception.—Except as specifically recognized by or provided in

Section 6 [§50-1106] of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. [Acts 1965, No. 51, §3, p. 165.]

50-1104. Owner's immunity from liability.—Except as specifically recognized by or provided in Section 6 [§50-1106] of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose.

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons. [Acts 1965, No. 51, §4, p. 165.]

Ark. Stat. Ann. §50-1106 provides that landowners remain liable for willful or malicious failure to guard or warn against a dangerous condition and that landowners who charge for the recreational use of their land are not immune from liability.

Plaintiff contends that the United States, acting through the Corps of Engineers, willfully failed to guard or warn against the dangerous condition created by the cable. Plaintiff introduced evidence establishing that the land in question is owned by the United States and within the control of the Corps of Engineers. Plaintiff also established that the construction company removed the bridge in 1945,

but had left the cable and post to which it was attached on the east bank. Plaintiff established that Joe Farris, a former Ranger employed by the Corps, was aware of the post and cable while he worked as a Ranger. The plaintiff showed that Bobby Kendricks, Supervisory Ranger of the Norfork Lake area, who had worked for the Corps between 1965 and 1974, also knew of the cable during his employment. The plaintiff also established that Charles Jones, a wildlife officer of Baxter County, Arkansas, had seen a rubber raft lodged onto the cable in 1973 and had mentioned the incident to a Ranger employed by the Corps who admitted having knowledge of the incident.

The plaintiff also established that R.M. Ruthven had floated the area where the accident occurred several times before Mr. Livingston's death without noticing the cable.

Ark. Stat. Ann. §50-1101, et seq., which imposes limited liability on landowners who allow their land to be used for recreational purposes, has never been applied by the Arkansas Supreme Court. Section 50-1106 (a) provides that landowners remain fully liable "for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." Identical language has been interpreted by the Georgia Appellate Court to exclude liability when the landowner has only constructive knowledge of the condition, but imposes liability if the landowner has actual knowledge of the condition involving an unreasonable risk of death or serious bodily harm and that the condition is not apparent to those using the property and if the landowner chooses not to guard or warn against the danger in disregard of the possible consequences. *McGruder v. Georgia Power Co.*, 126 Ga. App. 562, 191 S.E.2d 305 (1972).

In Arkansas, to constitute "willful and wanton negligence," one must be "conscious of his conduct, and, although having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury." *Scott v. Shairrick*, 225 Ark. 59, 65, 279 S.W.2d 39 (1955).

We hold that plaintiff has failed to establish that the United States willfully or maliciously failed to guard or warn against a dangerous condition or structure, within the meaning of Ark. Stat. Ann. §50-1106 (a). Although plaintiff established actual knowledge of the condition on the part of the Corps of Engineers, she offered no proof that the Corps had actual knowledge that the cable was not apparent to those on the stream. We hold that to establish willfulness, plaintiff had to prove not only that the cable was not apparent, but also that the Corps knew the cable constituted a trap.

The plaintiff also contends that in applying the law of Arkansas, this Court should apply Arkansas' choice of law rules. Plaintiff contends that if the Arkansas Supreme Court were presented with this issue, it would apply the law of Oklahoma. Plaintiff points out that the deceased, plaintiff and her minor children, were and are residents of Oklahoma, and that their only contact with Arkansas is that it is the location of the tortious injury. Although the Arkansas Supreme Court no longer strictly adheres to the traditional rule of locus delicti, the contracts which Arkansas has with Mr. Livingston's fatal injury are considerably greater than those of Oklahoma. *Cf., Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 53 (1977).

Even if we were to apply Oklahoma law, the result would not differ. In 1971, the Oklahoma legislature enacted the following law, codified as Okla. Stat. Ann. 2 §1301-315:

> §1301-315. Limitation on liability of persons making available to public certain areas for recreational purposes without charge
>
> A. The purpose of this section is to encourage persons to make available to the public land, water areas and park areas for outdoor recreational purposes by limiting their liability to persons going thereon and to third persons who may be damaged by the acts or omissions of persons going thereon.
>
> B. An owner or lessee who provides the public with a park area for outdoor recreational purposes owes no duty of care to keep that park area safe for entry or use by others, or to give warning to persons entering or going on that park area of any hazardous conditions, structures or activities thereon. An owner or lessee who provides the public with a park area for outdoor recreational purposes shall not by providing that park area:
>
> 1. Be presumed to extend any assurance that such park area is safe for any purpose;
>
> 2. Incur any duty of care toward a person who goes on the park area; or
>
> 3. Become liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on that park area.
>
> C. This section shall not apply if there is any charge made or usually made by entering or using such park area, or any part thereof, or if any commercial or other activity for profit is conducted on such park area, or any part thereof.

D. An owner of land or water area leased to the state for outdoor recreational purposes owes no duty of care to keep that land or water area safe for entry or use by others, or to give warning to persons entering or going on that land or water of any hazardous conditions, structures or activities thereon. Any owner who leases land or water area to the state for outdoor recreational purposes shall not by giving such lease:

1. Be presumed to extend any assurance that such land or water area is safe for any purpose;

2. Incur any duty of care toward a person who goes on the leased land or water area; or

3. Become liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on the leased land or water area. The foregoing applies whether the person going on the leased land or water area is an invitee, licensee, trespasser or otherwise.

E. This act does not relieve any person of liability which would otherwise exist for want or ordinary care or for deliberate, willful or malicious injury to persons or property. The provisions hereof shall not be deemed to create or increase the liability of any person.

F. The term outdoor recreational purposes as used in this act shall include, but not necessarily be limited to, hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing and visiting historical, archaeological, scenic or scientific sites.

The defendant has shown that in 1943 a dam was completed by the Corps of Engineers which greatly changed the character of the river. It is well established that "[I]f the river was navigable prior to construction of the dam, it continues to be considered as a navigable stream."

George v. Beavark, 402 F.2d 977, 978 (8th Cir. 1968). We, therefore, look to the condition of the Norfork River in 1941, the date construction was begun on the dam.

In 1941, the only traffic on the river were fishermen and their guides and an occasional raft of logs. The earlier commerce on the river had abated due to the automobile, improved roads, extended railroad service, and a lessening demand and supply for those products which in earlier times had been transported on the river. Even though commercial traffic on the river had almost entirely ceased by the time construction of the dam was begun, we hold that we must examine the history of the river to determine if it was historically navigable.

In *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906), the Court held that Big Lake was not a navigable body of water. The Court did not rely on the historic uses of the lake, but considered its condition "of recent years and the present." Subsequent to *Harrison v. Fite*, *ibid*, the United States Supreme Court held part of the New River navigable in *U.S. v. Appalachian Power Co.*, 311 U.S. 377 (1940), and stated at pp. 408, 409-410:

> When once found to be navigable, a waterway remains so . . . .
>
> . . . .
>
> Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the

coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.

Following *U.S. v. Appalachian, ibid*, a case arose involving Beaver Lake, a lake created by damming the uppermost reaches of the White River. The plaintiffs did not show that portion of the river in question had ever had any commercial traffic. Instead, plaintiff attempted to show navigability solely by relying on the fact that the river had been used for pleasure fishing with paid guides. The Court held that the plaintiff had failed to prove navigability. *In Re River Queen*, 275 F. Supp. 403 (W.D. Ark. 1967) (opinion by Judge John E. Miller). The Court of Appeals for the Eighth Circuit affirmed Judge Miller's decision, sub nom. *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968). Although the appellate court did not expressly overrule its 1906 *Harrison v. Fite* ruling concerning the role to be given a past history of navigability, the Court very carefully pointed out that the plaintiff had introduced no evidence of "the stream's being used commercially . . . ." (*George v. Beavark, Inc.*, 402 F.2d 977, 979), "absent any evidence of a channel of useful purpose to trade or commerce . . . ." (p. 979), and "[T]here is no record evidence of past history . . . ." (p. 981).

Other courts have recognized that navigability exists if:

(1) it *presently* is being used or is suitable for use, *or*

(2) it has been used or was suitable for use in the *past*, *or*

(3) it could be made suitable for use in the *future* by reasonable improvements.

Rochester Gas and Electric Corp. v. Fed. Power Comm'n, 344 F.2d 594 (2d Cir. 1965).

From the above analysis, we hold that the history of a stream or river may be determinative of its navigability.

Mr. Lloyd Fisk, the Chairman of the Committee which compiled *Baxter County History, Centennial Edition*, and the President of the Baxter County Historical Society, testified concerning the historical uses of the Norfork River. Plaintiff also produced as witnesses Mr. T. E. Simpson, an 82-year-old man who has been a resident of Baxter County since 1916, and Mr. Ed Henderson, 71 years old, who has lived in Norfork for 62 years.

The first white man to settle in Baxter County was Major Jacob Wolfe. In 1809, Major Wolfe constructed a house at the confluence of the White and Norfork Rivers, in the present site of Norfork, Arkansas. The settlement grew, and was called Liberty. The settlers engaged in mining, trapping and logging. All products were procured in the area upstream from the mouth of the Norfork river and were floated downstream to Norfork where they were loaded onto barges or steamboats on the White River and transported to the Mississippi River.

The early settlers who engaged in trapping, mining and logging had no means of transportation other than the rivers. The main stream of the White River has long been recognized as navigable. It was known as a major artery for inland bound settlers. The early settlers of Liberty used canoes and flat bottom boats to go upstream and to float their products either to Norfork for sale or to some spot on the White River.

When the railroad was built in 1907, the settlement of Liberty changed its name to Devereau and began to thrive. Although some trapping still occurred, the chief industries were agriculture and logging. All logging and trapping was done along the Norfork as far upstream as Hudson Mill, Missouri. The loggers would make their way upstream and cut several loads of logs. When the fall and spring rains would come, they would build the logs into rafts measuring 20 feet wide and occasionally a quarter of a mile long, and steer them down the river to Devereau. Cedar logs and railroad ties were stacked on top of each other to make a raft two logs deep. The walnut and pine was sawed into logs at the sawmill in Devereau, and shipped by steamboat on the White River or by railroad. The cedar would be made into shingles at a factory in Devereau or shipped as logs on the railroad. Much of the logging business consisted of cutting and hewing timbers into railroad ties, floating the ties to Devereau and loading them onto the train. Devereau soon changed its name to Norfork.

During the summer and winter, when the river was lower, logging still occurred. The loggers would have prepared rafts so that as soon as a large rain occurred, they could bring the logs down river.

The logging traffic was neither insignificant nor spasmodic. Due largely to the logging business, the town of Norfork prospered and grew to a population of 500. It had a bank, a saw mill and shingle factory, a steamboat landing, and a fur buyer. Although the town of Norfork remains, it does not enjoy the prosperity of its earlier years when it was known as the commercial center of the county.

Between 1900 and 1930, several rafts of logs came into Norfork every week when the river was high enough.

The river was high enough to float large rafts of logs and railroad ties, not only for months each spring and fall, but also for many weeks during the summer and winter following a large rain.

The farmers who lived in Norfork also used the Norfork River for commercial purposes. In the summer after the crops were planted, most farmers and their sons would paddle and portage large flat-bottomed boats approximately 20 miles upstream to gather mussel shells. The boats would hold almost two tons of mussel shells. When the boat was filled, they would be floated downstream to Norfork, sold for $40.00 or more a ton, and shipped by railroad to a button factory in Batesville, Arkansas. As many as two or three hundred people dug and transported mussel shells during the summer months.

Trapping remained a lucrative business for farmers during the winter. Trapping primarily occurred near Missouri. The river was the major transportation system for the trappers going upstream and it was the only means of getting the pelts to Norfork, the only convenient place where the pelts could be sold.

The physical appearance of the river was different before the dam was built. The high waters each spring and fall kept the river clear of boulders and logs and also kept the undergrowth on the banks under control. The loggers who rafted down the Norfork also did what clearing they could to make maneuvering their rafts easier. Though there would be parts of the river which would dry up each summer, the summer rains occurred often enough so that the transportation of boats of mussel shells could occur with some frequency.

The defendant pointed out that no steamship ever floated the Norfork River; that the rafting, fur trapping and mussel shell business was seasonal or dependent on a summer rain; that a grist-mill dam partially blocked the river except in very high water and that most commercial uses of the river had ceased by 1941.

In *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926), the Court stated:

> The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

As stated in *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968), quoting from *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906):

> To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs.

As stated in 78 Am. Jur. 2d, Waters §64:

> In order that a stream or body of water may be navigable in the legal sense, it is not necessary that it be capable of navigation at all seasons of the year, or at all stages of the water. If, in its natural state and with its ordinary volume of water, either constantly or at regularly recurring seasons, it has such capacity that it is valuable to the public, it is sufficient. As stated in some cases, a stream, to be navigable, must be capable of navigation either for the whole or part of the year. The fact that in the dry season a stream is not capable of use, or that in times of drought navigation is difficult, and sandbars and vegetation at times interfere with navigation, does not necessarily detract from the character of a stream as a navigable one. But the period of capacity must be sufficiently regular and continued to make the stream of commercial importance or of significant value to the public. It must contain, for a season, or considerable part of the year, that depth of water which fits it for such transportation or use. This excludes all those streams which have the requisite volume of water only occasionally, as the result of freshets and for brief periods, as being unnavigable and private property. In any case, the period or duration of navigable capacity may be a factor of importance in determining the legal status of a stream as navigable or otherwise.

We find that the lower reaches of the Norfork River was once navigable. In law, it remains so.

The defendant also has introduced evidence that in 1933 the Corps of Engineers issued a report which declared the Norfork River non-navigable. As taught in *George v. Beavark, Inc.*, 402 F.2d 977 (1968), this is evidence to be considered, but is not dispositive of the issue of navigability. The 1933 report was not shown to have been based on any consideration of the historic commerce on the

river. We find that the report does not outweigh plaintiff's evidence concerning the river's historic commercial uses.

Having determined that the stream where Mr. Livingston was drowned was navigable, we address the issue of the negligence of the United States.

The evidence reveals that the United States, acting through the agents and employees of the Corps of Engineers, had ownership, possession and control of the river where Mr. Livingston was killed and the land lying on each side of the stream. The Corps had actual knowledge that persons who came to fish and float the rivers would venture upstream not only as far as the cable was located, but also even further upstream to where the Corps had erected a sign warning boaters of the hazards from the current.

The Corps had actual knowledge that the cable posed a threat to those who used the river. The previous incident involving a rubber raft, as well as the general circumstances of the current and the cable, should have put the Corps on notice of the dangerous character of the cable. Although the Corps' culpability falls short of being willful, it constitutes a breach of the duty to use ordinary care.

The government has contended that the cable was open and obvious. Testimony from several witnesses, including employees of the Corps, reveal that the cable could easily have been overlooked by boaters.

The government has also contended that there were two signs warning boaters of the hazards of the current. Both signs were upstream from the cable. They warned persons not to go further upstream due to the current. The

signs constituted no warnings whatsoever concerning the cable which was 200 feet downstream from the first sign. Mr. Livingston never went as far upstream as either sign.

The government also contends that Mr. Livingston was himself negligent in not paying attention to what was in front of his free-floating boat. Comparative negligence does not defeat Mrs. Livingston's claim. We find that Mr. Livingston's own negligence was small in comparison to that of the Corps. Though the government showed that Mr. Livingston was familiar with the White and Norfork Rivers, there was no evidence that he had ever before ventured as far upstream as the cable. Even if we infer that he had, the preponderance of evidence reveals that he may not have noticed the cable, since it was easily overlooked.

The Honorable Terry Shell issued an order by which he chose to bifurcate the issue of liability from the issue of damages. The Clerk will not prepare a judgment in either Case number H-75-1-C or Case number H-76-19-C until the amount of damages has been determined.

This 4 day of May, 1979.

/s/ Paul K. Williams

United States District Judge

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

JANE LIVINGSTON, ADMINISTRATRIX OF
THE ESTATE OF HALDON C. LIVINGSTON,
DECEASED PETITIONER

VS.

UNITED STATES OF AMERICA RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 1980, a copy of the Petition for Writ of Certiorari was mailed, postage prepaid, to each of the following counsel: Mr. Larry R. McCord, United States Attorney, P.O. Box 1524, Fort Smith, Arkansas 72902; Messrs. Leonard Schaitman and Marc Richman, Attorneys, Appellate Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530; and Mr. Thomas L. Jones, Trial Attorney, Torts Branch, Civil Division, Department of Justice, Washington, D.C. 20530.

/s/ Sidney S. McMath

SIDNEY S. McMATH
McMATH & LEATHERMAN, P.A.
711 West Third Street
Little Rock, Arkansas 72203

No. 80-822

In the Supreme Court of the United States

OCTOBER TERM, 1980

JANE LIVINGSTON, ADMINISTRATRIX OF THE ESTATE OF HALDON C. LIVINGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Adams v. *Montana Power Co.*, 528 F. 2d 437 4

Chapman v. *United States*, 575 F. 2d 147, cert. denied, 439 U.S. 893 4

Daniel Ball, The, 77 U.S. (10 Wall) 557 3

Economy Light & Power Co. v. *United States*, 256 U.S. 113 3

Kaiser Aetna v. *United States*, 444 U.S. 164 .... 3, 4

Montello, The, 87 U.S. (20 Wall.) 430 3

Rochester Gas and Electric Corp. v. *FPC*, 334 F. 2d 594 3-4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-822

JANE LIVINGSTON, ADMINISTRATRIX OF THE ESTATE OF HALDON C. LIVINGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that federal admiralty jurisdiction encompasses a tort claim arising from a pleasure-boat accident on a dam-obstructed, wholly intrastate body of water that has not been used for commercial shipping in 40 years.

1. Petitioner Jane Livingston is the representative of the estate of Haldon C. Livingston, who drowned as a result of a pleasure-boating accident while fishing on the North Fork River in north-central Arkansas. The decedent's rented fishing boat struck a partially concealed steel cable that ran from the top of a 12-foot post on the shore down to and through the water and was anchored in the river bed. The decedent somehow became wedged between the cable and the boat and was pinned underwater (Pet. App. 12-13).

The North Fork River was once the site of significant commercial traffic. However, since at least 1941, when a hydroelectric dam was built, traffic on the river has been limited almost exclusively to recreational fishing (Pet. App. 15-17). The United States, through the Army Corps of Engineers, owns the river and both banks in the area of the accident (*id.* at 12). The cable (together with the post to which it was attached) was a remnant of a temporary bridge built in the 1940's by the contractor who built the dam. The contractor removed the bridge in 1945 but apparently overlooked the cable (*id.* at 13).

Petitioner brought two civil actions in the United States District Court for the Western District of Arkansas, one in admiralty and the other under the Federal Tort Claims Act, which were subsequently consolidated for trial. The district court entered judgment for the United States on the tort claim but ruled against the government on the admiralty claim (Pet. App. 23-42) and awarded petitioner damages of $192,800 (*id.* at 12). In ruling on the admiralty claim, the court held that it possessed the requisite jurisdiction because the North Fork River had once been navigable and had been used as a commercial artery prior to the construction of the hydroelectric dam in 1941. The court found unpersuasive the fact that the river is not currently used for commercial purposes and that the presence of the dam makes interstate travel impossible (*id.* at 33-40).

The court of appeals reversed (Pet. App. 11-22), holding that "admiralty jurisdiction was improperly invoked in this case" (*id.* at 12). The court stated that "the concept of 'navigability' in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping" regardless of their historic usage (*id.* at 21).

2. The decision below is correct, is consistent with decisions of this Court, and does not conflict with any decision

of another court of appeals. Further review is therefore unwarranted.

The court of appeals correctly rejected the district court's assumption of jurisdiction based on historical navigability, citing (Pet. App. 20) this Court's recent admonition in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979) (citation omitted), that cases defining navigability must be evaluated carefully in light of " 'the *purpose* for which the concept of 'navigability' was invoked in a particular case.' " As the court of appeals noted, *Kaiser Aetna* makes clear that definitions of navigability in Commerce Clause cases, given the historical breadth of the commerce power, necessarily will be more expansive than in "other contexts where the actual capability of a stream to support navigation is critical. What is required in those contexts is a functional analysis of 'navigability,' so that the limits of governmental authority are determined in accordance with the purposes it serves" (Pet. App. 20; citation omitted). Since "admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity" (*id.* at 20-21), the absence of actual commercial shipping on a waterway eliminates the rationale for exercising admiralty jurisdiction over recreational accidents on that waterway. In short, the fact that commercial activity once flourished on the North Fork River is simply irrelevant to the present determination of admiralty jurisdiction.

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), and *The Montello*, 87 U.S. (20 Wall.) 430 (1874), although brought in admiralty, involved the scope of the commerce power and are therefore plainly distinguishable from the instant case. *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921), a case concerned with the scope of judicial power under the Rivers and Harbors Act of 1899, is similarly distinguishable, as is *Rochester Gas and Electric*

Corp. v. *FPC*, 344 F. 2d 594 (2d Cir. 1965), which rested on both the commerce power and the Rivers and Harbors Act by analogy. See *Kaiser Aetna* v. *United States, supra,* 444 U.S. at 171-172.

Finally, the decision in this case is fully in accord with *Adams* v. *Montana Power Co.*, 528 F. 2d 437 (9th Cir. 1975), and *Chapman* v. *United States,* 575 F. 2d 147 (7th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978), in which the courts of appeals rejected claims that a waterway's previous history as a commercial shipping route conferred federal admiralty jurisdiction over recreational boating accidents in the absence of significant current commercial activity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

DOJ-1981-01